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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Georgia Power Company; Savannah Electric and Power Company--Costs

File: B-289211.5; B-289211.6

Date: May 2, 2002

David K. Wilson, Esq., Troutman Sanders, for the protester.
Steven W. Feldman, Esq., and Craig R. Schmauder, Esq., U.S. Army Corps of Engineers, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency unduly delayed taking corrective action until after submission of the agency report and the protesters' comments in the face of clearly meritorious protests that the agency did not, as contemplated by the solicitation, reasonably evaluate whether the awardee's past performance was for services similar in size, magnitude, and complexity to the solicitation requirement; General Accounting Office recommends that the protesters be reimbursed for the costs of filing and pursuing their protests.

DECISION

Georgia Power Company and Savannah Electric and Power Company request that our Office recommend that the firms be reimbursed the reasonable costs of filing and pursuing protests they filed, on October 19, 2001, challenging awards made to Canoochee Electric Membership Cooperative by the U.S. Army Corps of Engineers under request for proposals (RFP) No. DAC87-01-R-0005 for the privatization of electric distribution services at Fort Stewart and Hunter Army Airfield (AAF). On December 12, 2001, after receipt of the protesters' comments on the agency's report, the Corps took corrective action in response to the protests. Based upon the promised corrective action, we dismissed the protests as academic. The protesters contend that the Corps unduly delayed taking corrective action in the face of clearly meritorious protests.

We grant the protesters' requests and recommend that the agency reimburse the protesters their reasonable costs of filing and pursuing the protests.

The RFP was issued pursuant to 10 U.S.C. § 2688 (2000) for the privatization of electric distribution systems at Fort Stewart and Hunter AAF (two separate military installations). Under that section, the "Secretary of a military department may convey a utility system, or part of a utility system, under the jurisdiction of the Secretary to a municipal, private, regional, district, or cooperative utility company or other entity." 10 U.S.C. § 2688(a); see Virginia Elec. And Power Co.; Baltimore Gas & Elec. Co., B-285209, B-285209.2, Aug. 2, 2000, 2000 CPD ¶ 134 at 2.

The RFP provided for the award of one or more 50-year contracts for the transfer of ownership of electric distributions systems at Fort Stewart and Hunter AAF, and to obtain distribution services from the new owner(s) of the systems. RFP § B. A detailed statement of work described the required services. Among other things, the contractor(s) would be

> required to provide all electric distribution utility service(s) on a 24 hour, 365 days per year basis. The Contractor, at its expense, [would be required to] furnish, install, operate, and maintain all facilities required to furnish the service hereunder.

RFP amend. 11, § C.1. In addition, the contractor(s) were responsible for financing all capital improvements necessary to maintain, modify, repair, upgrade, and expand each system to meet the installations' utility requirements. Id.

The RFP provided for award(s) on the basis of an integrated assessment of the following factors: (1) technical approach, experience and capability; (2) past performance; and (3) cost/price. Factor (1) was stated to be more important than factor (2), and factors (1) and (2) were stated to be together significantly more important than factor (3). Id. § M.II. Offerors were informed that award would not necessarily be made based upon only low price or high technical ratings. Id. § M.I.A. With respect to the past performance factor, the RFP stated that:

> The offeror's past performance will be evaluated for the quality of product and service, timeliness of performance, cost control, safety, customer satisfaction, the comprehensive nature of previous projects and of the offeror's commitment to customer satisfaction. Each offeror will be evaluated on past performance under existing and prior contracts/subcontracts for services similar in scope, magnitude, and complexity to this requirement.

Id. § M.II.

Detailed proposal preparation instructions were provided with regard to responding to each of the evaluation factors. Id. § L. With respect to the second factor, past performance, the RFP requested, among other things, references for "a minimum of ten of the offeror's largest customers (by demand capacity) and/or projects of similar scope," and requested a "list of all system acquisitions in the last 10 years or all

contracts and subcontracts currently in process, which are of similar scope, magnitude, and complexity." Id. § L.7(a), (b).

Offers were received from five firms, including Georgia Power, Savannah Electric, and Canoochee, by the closing date for receipt of proposals, and evaluated by the agency's source selection evaluation board (SSEB). The Corps included the proposals of Georgia Power, Savannah Electric, and Canoochee in the competitive range, conducted discussions with these firms, and received proposal revisions. Contracting Officer's Statement at 5. The firms received the following evaluation ratings:[1]

	Technical Approach	Past Performance	Cost/Price (5-year total)
Fort Stewart			
Canoochee	[Deleted]	[Deleted]	$[Deleted]
Georgia Power	[Deleted]	[Deleted]	$[Deleted]
Hunter AAF			
Canoochee	[Deleted]	[Deleted]	$[Deleted]
Savannah Electric	[Deleted]	[Deleted]	$[Deleted]

Agency Report, Tab 22, Proposal Evaluation Summary Report, Sept. 27, 2001, at 1. The agency determined that, given the "relatively small difference between the offerors' ratings for Factor 1 and Factor 2," award based on Canoochee's low-priced proposal represented the best value to the government.[2] Contracting Officer's Statement at 5.

On October 19, 2001, Georgia Power and Savannah Electric protested to our Office, challenging the agency's evaluation of Canoochee's proposals under the past performance evaluation factor and the source selection decisions. With respect to Canoochee's past performance, the protesters asserted that "Canoochee does not have a history of providing service to customers on the scale envisioned by the solicitation." Savannah Electric Protest at 6; Georgia Power Protest at 6.

On October 24, the Corps requested that we summarily dismiss the protests because they "failed to state legally sufficient grounds to challenge the award[s]." Agency's Dismissal Request, Oct. 24, 2001, at 1. With respect to Canoochee's past

[1] [Deleted].

[2] The contemporaneous evaluation record indicated that the agency concluded that the protesters' and awardee's offers were "technically equal" under factors (1) and (2), [Deleted]. See Agency Report, Tab 23, Award Recommendation, Sept. 28, 2001, at 7.

performance rating, the Corps asserted that the protesters' "bare bones contention" that Canoochee did not have a history of providing services to customers on the same scale envisioned by the RFP did not establish the "likelihood" of improper agency action. Id. at 4-5. In an October 25 telephone conference, we denied the agency's dismissal request.

Thereafter, on November 21, the Corps submitted its agency report, in which it maintained that all of the protest grounds should be denied. With respect to the past performance rating, the Corps asserted in its Legal Memorandum that Canoochee's proposal was properly rated as "[Deleted]," on the basis of Canoochee's many projects that singly and cumulatively had requirements similar to those at Fort Stewart and Hunter AAF. Agency's Legal Memorandum at 5-8.

On November 30, the protesters filed their comments on the agency's report. Among other things, the protesters complained that Canoochee did not, as required by the RFP, provide [Deleted]. The protesters argued that Canoochee did not have a single "customer that shares the scope, magnitude and complexity of the instant solicitation." Protesters' Comments at 7. The protesters also contended that the agency's determination that there was "an insignificant difference in the evaluation ratings for combined Factors 1 and 2 [was] . . . not supported by the facts and is unreasonable;" the protesters contended that, in accordance with the RFP's best value award scheme, they were entitled to awards on the basis of their superior proposals. Protesters' Comments at 3.

On December 10, we conducted a telephone conference with the parties to discuss the adequacy of the record in this case. With respect to the evaluation of Canoochee's past performance, we informed the parties that we did not see from our review of the contemporaneous evaluation record any evidence that the agency had assessed whether Canoochee had past performance under existing and prior contracts/subcontracts for services similar in scope, magnitude, and complexity to this requirement, as required by the RFP. We also stated that [Deleted]. We asked whether the Corps had further evaluation records or information to provide with respect to Canoochee satisfying this requirement. We also requested that the Corps reply to the protesters' comments with respect to the awardee's past performance evaluation.

On December 12, the Corps informed us and the parties that it was taking corrective action in response to the protests. Specifically, the agency stated:

> After reviewing the protests, the agency report, and the protesters' comments on that report, the [Corps] is now taking corrective action in response to the protest. Our primary concerns relate to the past performance evaluations.

> The corrective action plan is to amend the RFP, and to hold discussions with the competitive range proposers. Thereafter, the Contracting Officer will seek revised proposals. In the meantime, the award will be held in place. If the decision is to continue with [Canoochee], the award decision will be confirmed. If the decision is to go with other offerors, then [Canoochee's] contract will be terminated for convenience. All offerors will be treated fairly during the recompetition and will be given a full opportunity to obtain an award.

Agency's Letter to GAO (Dec. 12, 2001).

Based on the agency's proposed corrective action, we dismissed the protests as academic on December 14, 2001. Thereafter, in accordance with our Bid Protest Regulations, 4 C.F.R § 21.8(e) (2001), the protesters requested that we recommend reimbursement of their protest costs because the Corps had unduly delayed taking corrective action in the face of the protesters' meritorious protests.

The Corps generally disputes the protesters' contention that their protests were clearly meritorious, stating that it "relies on its previous and present filings in this protest to support its position." Agency Reponse to Protesters' Requests for Entitlement to Costs, Jan. 4, 2002, at 2. The Corps acknowledges, however, that it concluded from its own review of the contemporaneous evaluation record that "documentation of all the offerors' past performance might have been questionable to support the award to [Canoochee]." Id.

Where a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 16. For a protest to be clearly meritorious, the issue involved must not be a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3. Rather, the record must establish that the agency prejudicially violated a procurement statute or regulation. Tri-Ark Indus., Inc.--Declaration of Entitlement, B-274450.2, Oct. 14, 1997, 97-2 CPD ¶ 101 at 3.

Here, the record is devoid of evidence that the agency contemporaneously evaluated whether Canoochee's past performance under existing and prior contracts or subcontracts was for services similar in scope, magnitude, and complexity to the

RFP requirements.[3] As noted above, the RFP provided for a qualitative evaluation of the similarity of an offeror's past performance to "the scope, magnitude and complexity" of the RFP requirements. See RFP amend. 11, § M.II. Also as noted, Canoochee's proposal was rated by the SSEB as "[Deleted]" under the past performance factor. The record reflects that this rating was primarily based upon the SSEB's [Deleted]. Agency Report, Tab 22, Past Performance Questionnaires and Ratings, Sept. 27, 2001, at 66-67. Although [Deleted], they do not provide any information that the services provided by the awardee were of size, complexity, and scope similar to the RFP requirements. We also find from our review that [Deleted]. In sum, the record does not support the agency's determination that Canoochee's proposal should be rated "[Deleted]" under the past performance factor.

In contrast, in evaluating the protesters' past performance, the SSEB specifically assessed whether the protesters' past performance was for services of similar scope, magnitude, and complexity. In fact, the SSEB noted as evaluation strengths under the past performance evaluation factor the protesters' performance of projects of similar size and complexity. The record reflects that the protesters' [Deleted] evaluation rating for past performance was based, at least in part, upon the protesters' performance of "projects of similar scope and complexity" (Georgia Power) and "past performance projects of similar scope and complexity (supply and [operations and maintenance])" (Savannah Electric). Agency Report, Tab 22, Past Performance Questionnaires and Ratings, Sept. 27, 2001, at 62-65.

We find that Savannah Electric's and Georgia Power's protests were clearly meritorious. It is fundamental that offerors be advised of the basis upon which their proposals will be evaluated and that agencies evaluate in accordance with the stated evaluation criteria. Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(a)(2)(A), (b)(1) (2000); Federal Acquisition Regulation (FAR) §§ 15.304(d), 15.305(a). Here, the record establishes that the agency's evaluation of Canoochee's past performance did not comport with this standard because it did not consider whether Canoochee's past performance was on contracts of similar size, scope and complexity.

[3] As noted above, the Corps asserted in the Legal Memorandum filed in response to the protests that Canoochee's proposal was properly rated as "[Deleted]," on the basis of Canoochee's many projects that singly and cumulatively had requirements similar to those at Fort Stewart and Hunter AAF. Agency's Legal Memorandum at 5-8. This suggestion that Canoochee's past performance was qualitatively evaluated in accordance with the RFP's evaluation criteria is belied by the contemporaneous evaluation record that, as explained below, shows that Canoochee's past performance was not evaluated for similar size, scope, and complexity, as required.

Moreover, the source selection official adopted the unsupported evaluation findings of the SSEB to conclude that, considering the offerors' ratings under all the technical evaluation factors, there was an insignificant difference between the protesters' and awardee's proposals. See Contracting Officer's Statement at 5; Agency Report, Tab 24, Source Selection Decision (Sept. 28, 2001). Since the record does not support the finding that there were insignificant technical differences between the awardee's and protesters' proposals, the decision is inconsistent with 10 U.S.C. § 2305(b)(1) and FAR §§ 15.304(a) and 15.308, which require such decisions to be based upon a comparative assessment of proposals against the evaluation criteria stated in the solicitation.

The regulatory violations by the agency were prejudicial to the protesters because the evaluation was not in accord with the announced evaluation criteria and because [Deleted] was not considered in the source selection decisions. We also find that a reasonable agency inquiry into the protests allegations would have disclosed the absence of a defensible legal position and that by unduly delaying corrective action the Corps caused the protesters to expend unnecessary time and resources to make further use of the protest process to obtain relief.

The Corps nevertheless argues that we are without authority to recommend the award of protest costs where a contracting agency takes corrective action that results in the dismissal of the protest. The Corps states that our statutory authority to recommend the award of costs is predicated upon a finding that a solicitation, proposed award, or award of a contract does not comply with a statute or regulation. See CICA, 31 U.S.C. § 3554(c)(1) (1994). The Corps contends that where an agency takes corrective action that results in dismissal of a protest, our Office does not make the required finding of a statutory or regulatory violation that would support a recommendation for reimbursement of protest costs. The Corps also argues that section 21.8(e) of our Bid Protest Regulations, which states that where a contracting agency decides to take corrective action in response to a protest, we may recommend the award of protest costs, conflicts with our statutory authority and is therefore invalid. See 4 C.F.R. § 21.8(e). Specifically, the Corps asserts that section 21.8(e) improperly permits our Office to recommend the award of protest costs without finding a statutory or regulatory violation. Agency's Response to Protesters' Requests for Entitlement at 2-7 (Jan. 4, 2002).

In matters concerning the interpretation of a statute, the first question is whether the statutory language provides an unambiguous expression of the intent of Congress. If it does, the matter ends there, for the unambiguous intent of Congress must be given effect. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

As amended, CICA provides that:

> If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal Agency conducting the procurement pay to an appropriate interested party the costs of --

filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees; and bid and proposal preparation.

31 U.S.C. § 3554(c)(1).[4] Thus, CICA unambiguously grants our Office the authority to recommend the reimbursement of protest costs where we determine that an agency's procurement action violates a statute or regulation. In our view, this includes where the determination of a statutory or regulatory violation is made as part of our resolution of a protester's request for entitlement to protest costs after an agency takes corrective action in response to a protest--nothing in CICA prohibits such determinations. Section 21.8(e) of our Bid Protest Regulations implements this authority, providing, in pertinent part, that:

> If the contracting agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees.

4 C.F.R. § 21.8(e).

We agree with the Corps that our determination of a statutory or regulatory violation is the linchpin of our authority under CICA and our Regulations to recommend the reimbursement of costs under CICA. When we first promulgated the section of our regulations (then designated section 21.6(e)) to implement our authority to

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[4] As originally enacted, CICA provided that if the Comptroller General determined that an agency's conduct of a procurement violated a statute or regulation, "the Comptroller General may declare an appropriate interested party to be entitled to" protests costs and bid or proposal preparation costs. CICA, Pub. L. No. 98-369, 98 Stat. 1175, 1202, § 2741. The current statutory language was adopted by Congress in the Federal Acquisition Streamlining Act of 1994 (FASA), when this section was amended to provide that the Comptroller General may "recommend" that the contracting agency reimburse an interested party its protest costs and bid or proposal costs. FASA, Pub. L. No. 103-355, 108 Stat. 3243, 3289, § 1403 (1994). This change was intended to address questions that had been raised about the constitutionality of the original language. S. Rep. No. 103-258, at 8 (1994), reprinted in 1994 U.S.C.C.A.N. 2561, 2568.

recommend the reimbursement of protest costs where an agency unduly delays taking corrective actions, we noted:

> Some commenters stated that the award of costs where corrective action is taken is inconsistent with CICA, which authorizes GAO to award costs only where it makes a determination sustaining a protest. GAO agrees that mere corrective action would not warrant an award of costs. GAO will award costs under 31 U.S.C. 3554(c)(1) (1988) only where it concludes that corrective action is being taken because of a violation of a procurement statute or regulation.

56 Fed. Reg. 3759, 3762 (Jan. 31, 1991).

Consistent with CICA and our Regulations, we have recommended the reimbursement of protests only where agencies have taken corrective action in response to protests that we determined were clearly meritorious.[5] A clearly meritorious protest is one that clearly would have been successful--that is, it must involve a matter over which we have jurisdiction and be filed by an interested party in a timely manner and otherwise comply with the requirements of our Bid Protest Regulations, and the record must establish that the agency prejudicially violated a procurement statute or regulation. See Tri-Ark Indus., Inc.--Declaration of Entitlement, supra, at 3. Conversely, we have not recommended the reimbursement of protest costs where an agency has taken corrective action, where we determined that the protest was not clearly meritorious. See Millar Elevator Serv. Co.--Costs, B-281334.3, Aug. 23, 1999, 99-2 CPD ¶ 46 at 2 (protest was not clearly meritorious, although the contracting agency violated the Federal Acquisition Regulation, where the record did not establish that the protester was prejudiced). In finding that a protest was clearly meritorious, we determine, in accordance with CICA, that the agency's conduct of the procurement violated a statute or regulation to the detriment of the protester.

The Corps nevertheless argues that section 21.8(e) of our Regulations is invalid because it does not specifically state that we will recommend the reimbursement of costs only where, as provided by CICA, we find a statutory or regulatory violation. We disagree.

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[5] This is consistent with the agency's own authority to reimburse a protester's costs where, in connection with a protest, the agency determines that a solicitation, proposed award, or award does not comply with the requirement of law or regulation. See 41 U.S.C. § 253b(l (Supp. IV 1998); see also Inter-con Sec. Sys., Inc.; CASS, a Joint Venture--Costs, B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54 at 4.

To succeed in a challenge that a regulation is overly broad, which is essentially what the agency is arguing here, the Corps must "establish that no set of circumstances exists under which the [regulation] would be valid." Reno v. Flores, 507 U.S. 292, 301 (1993), citing United States v. Salerno, 481 U.S. 739, 745 (1987). In enacting CICA, Congress expressly granted to the Comptroller General the authority to promulgate regulations implementing the Act. See 31 U.S.C. § 3555. Regulations promulgated pursuant to such an express delegation of authority "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844.

Here, section 21.8(e) provides only that, where a contracting agency decides to take corrective action, we "may" recommend that the agency reimburse protester its protest costs. Both at the time of this section's promulgation and in our decisions since, we have consistently explained that we will make such a recommendation only where an agency has unduly delayed taking corrective action in the face of a clearly meritorious protest, that is, where, as here, we determine that the agency has violated a statute or regulation. Although the Corps can fashion a hypothetical situation in which section 21.8(e) may be read to be inconsistent with our grant of authority under CICA, it does not show (or even attempt to show) that the regulation is invalid in all applications. In sum, we find that section 21.8(e) of our Regulations is not only not "manifestly contrary" to CICA, but is not in its application here (where we have determined that the Corps has violated procurement statutes and regulations) outside our grant of authority under CICA. Accordingly, we find that section 21.8(e) of our Regulations is valid.

Furthermore, recommending the reimbursement of protests costs where an agency unduly delays taking corrective action in the face of a clearly meritorious protest is consistent with the congressional intent behind the statutory provision authorizing the reimbursement of costs. Congress believed that the prospect of protesters being reimbursed their bid protest costs, where they established the prejudicial violation of statutes and regulations, was necessary to enhance the effectiveness of the bid protest process. See H.R. Rep. No. 98-1157, 98th Cong., 2nd Sess. 24-25 (1984). The reimbursement of bid protest costs is to relieve protesters of the financial burden of vindicating the public interest as defined by Congress in CICA. Hydro Research Science, Inc.--Claim for Costs, B-228501.3, June 19, 1989, 89-1 CPD ¶ 572 at 3. In this regard, the bid protest process, as mandated by CICA, "was meant to compel greater use of fair, competitive bidding procedures 'by shining the light of publicity on the procurement process, and by creating mechanisms by which Congress can remain informed of the way current legislation is (or is not) operating.'" Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1104 (9th Cir.1988), quoting Ameron v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 984 (3rd Cir.1986).

The Corps also argues that under the United States Supreme Court's recent decision in Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human

Resources, 532 U.S. 598 (2001), we may not recommend the award of protest costs where an agency takes corrective action that results in the dismissal of a protest.

The question presented in Buckhannon was whether a party, which through the settlement of its lawsuit obtained "the desired result" without a judgment on the merits or court-ordered consent decree, could obtain attorneys' fees and costs under the fee-shifting provisions of the Fair Housing Amendment Act of 1988 (FHAA), 42 U.S.C. § 3601 et seq. (1994), and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. (1994). Those statutes provide, in pertinent part, that a "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs." Interpreting the express language of the statutes, the Court held that the statutes limited recovery to a prevailing party and that to be construed a prevailing party, the party must receive a judicially-created "alteration of the legal relationship of the parties." 532 U.S. at 604. That is, to be a "prevailing party," one must receive a decision on the merits or a court-ordered consent decree.

The Corps argues that where an agency takes corrective action that results in dismissal of the protest, the protester is not a "prevailing party" and therefore may not be reimbursed its protest costs. The simple answer is that unlike the FHAA and ADA, and other federal fee-shafting statutes, CICA does not limit our authority to recommend the reimbursement of protest costs to a "prevailing party." Rather, as explained above, we may recommend the reimbursement of costs to an "appropriate interested party" where we determine that an agency has violated statute or regulation, a determination that we have made in this decision.

The Corps nevertheless argues that the term "appropriate interested party" in CICA means the same thing as a "prevailing party," as that term was construed by the Court in Buckhannon. We disagree. The Court found that the term "prevailing party" that Congress chose to employ in other federal fee-shifting statutes was "a legal term of art." 532 U.S. at 603. CICA does not use that term of art, and instead refers simply to an "appropriate interested party." CICA defines "interested party" to mean "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551(2). An "appropriate" interested party would be a "specially suitable, fit or proper" interested party.[6] See Webster's New Int'l Dictionary 106 (3rd ed. 1965). There is nothing in the express language of CICA that compels the conclusion that to be an "appropriate interested party" requires a "judicially-mandated change in

[6] It is a fundamental canon of statutory construction that words, unless otherwise defined by the statute, will be interpreted consistent with their ordinary, contemporary, common meaning. State of California v. Montrose Chem. Corp. of California, 104 F.3rd 1507, 1519 (9th Cir. 1997); GAO, Principles of Federal Appropriations Law, vol. 1, at 2-61 (2d ed. 1991); see Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 301 (1989).

the relationship of the parties," as is required to be a "prevailing party" within the meaning of the ADA and FHAA. To read CICA consistent with the agency's arguments would require us to ignore the Court's underlying logic in Buckhannon, wherein the Court's statutory interpretation was grounded upon the statutes' express language. We decline to do so, given CICA's plain meaning.

We recommend that the protesters be reimbursed the reasonable costs of filing and pursuing the protests, including those incurred here, i.e., requesting a recommendation for costs. Jones/Hill Joint Venture--Costs, B-286194.3, Mar. 27, 2001, 2001 CPD ¶ 62 at 13-14. The protesters should submit their claim for costs, detailing and certifying the time expended and costs incurred, directly to the Corps within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel